**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER 06-0119**
**USE TAX FOR THE REPORTING PERIODS COVERING**
**JANUARY 1, 2002—NOVEMBER 30, 2002**

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## ISSUES

### I. Use Tax – Exemptions - Agricultural Machinery, Tools and Equipment

### Tax Procedure – Protests - Failure to Participate - Burden of Proof

Authority: IC §§ 6-2.5-3-1(a), -3-2(a), -3-4(a)(2) and (b), -3-7(a), -5-2(a) (1998); IC § 6-8.1-5-1(a) (2004); *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 114 S. Ct. 2251, 2257 (U.S. 1994); *Farmers Reservoir & Irrigation Co. v. McComb*, 69 S. Ct. 1274, 1277 (U.S. 1949); *J.D. Adams Mfg. Co. v. Storen*, 58 S. Ct. 913, 918 & *id.* n.18 (U.S. 1938); *State Bd. of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M.*, 765 N.E.2d 1257, 1264 (Ind. 2002); *Ind. Dep't of State Rev. v. Safayan*, 654 N.E.2d 270, 272 (Ind. 1995); *State v. Huffman*, 643 N.E.2d 899, 900 (Ind. 1994); *H.J. Heinz Co. v. Chavez*, 140 N.E.2d 500, 502 n.1 (Ind. 1957); *Peabody Coal Co. v. Ralston*, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991); *Porter Mem'l Hosp. v. Malak*, 484 N.E.2d 54, 58 (Ind. Ct. App. 1985); *Fleckles v. Hille*, 149 N.E. 915, 915-16 (Ind. App. 1925); *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1024 and 1024-25 (Ind. Tax Ct. 1999); *Canal Sq. Ltd. P'ship v. State Bd. of Tax Comm'rs*, 694 N.E.2d 801, 804 (Ind. Tax Ct. 1998); *Longmire v. Ind. Dep't of State Rev.*, 638 N.E.2d 894, 898 (Ind. Tax Ct. 1994); *Bullock v. Foley Bros. Dry Goods Corp.*, 802 S.W.2d 835, 839 (Tex. App. 1990); 45 IAC §§ 2.2-3-15, -3-20, -3-24,-3-25, -5-6 (2001); 45 IAC § 15-5-3(b)(6) and (b)(8) (2004); BLACK'S LAW DICTIONARY 209 (8th ed. 2004) (definitions of "burden of proof" and "burden of persuasion")

The taxpayer argues that the Department should not have proposed to assess him use tax on the value of a four-wheel all-terrain vehicle he purchased under a farm exemption certificate because he uses it to inspect his irrigation equipment and his farm.

**II. Use Tax – Exemptions - Medical Equipment, Supplies and Devices**

**Tax Procedure – Protests - Failure to Participate - Burden of Proof**

Authority: IC § 6-2.5-5-18 (1998); IC § 6-8.1-5-1(a) (2004); *Stump v. Ind. Dep't of State Rev.*, 777 N.E.2d 799, 802 (Ind. Tax Ct. 2002); 45 IAC 2.2-5-28 (2001)

The taxpayer also stated in his letter to the Department concerning the proposed assessment that he suffers from orthopedic problems that hinder his ability to walk and that the all-terrain vehicle saves from walking his farm. The Department will treat these statements for purposes of this protest as a claim that the all-terrain vehicle is exempt from use tax as medical equipment or a medical device.

## STATEMENT OF FACTS

The taxpayer is an individual whom the Audit Division of the Department investigated for nonpayment of use tax. The field investigator adjusted his liability, and the Audit Division proposed an assessment, for the period from January 1, 2002 to November 30, 2002 (hereinafter "the investigated period"). The adjustment and proposed assessment are for use tax on the value of a four-wheel all-terrain vehicle (hereinafter "ATV") for which he gave a farm exemption certificate from gross retail (sales) tax. The taxpayer told the investigator that the taxpayer used the ATV mainly to inspect the irrigation equipment and areas of his farm. The investigator found these uses not farm-exempt and made the resulting adjustment to assess use tax pursuant to 45 IAC § 2.2-3-20 (2001).

The taxpayer wrote a letter to the Department which it interpreted as a timely protest. Although the taxpayer did not ask for a hearing in his letter, the Appeals Section of the Department's Legal Division nevertheless set and mailed the taxpayer notice of a hearing on his deemed protest. That notice gave the date, time and place of the hearing, and also gave the taxpayer the option of conducting a telephonic conference with the hearing officer instead. The United States Postal Service did not return the notice letter to the Department as being undeliverable. The taxpayer neither appeared for the hearing nor contacted the hearing officer for a continuance or telephonic conference. He also has not submitted to the Appeals Section any materials other than his initial letter to support his deemed protest, such as a legal brief, books and records or other evidence. Additional facts will be provided as needed.

**I. Use Tax – Exemptions - Agricultural Machinery, Tools and Equipment**

**Tax Procedure – Protests - Failure to Participate - Burden of Proof**

## DISCUSSION

### A. TAXPAYER'S ARGUMENT

The taxpayer states that he uses the ATV to inspect his irrigation equipment and his farm generally. The Department infers from this statement that he believes the field investigator and the Audit Division erred in finding that he had used the ATV in a non-exempt manner and that its purchase price had therefore become subject to use tax. Before turning to the merits of this question, however, the Department will first set out immediately below a taxpayer's procedural responsibilities in a protest and point out how the taxpayer has failed to meet these responsibilities in the present protest.

### B. ANALYSIS

#### 1. Applicable Procedure

*a. The Burden of Proof Is on the Taxpayer, Not the Hearing Officer or the Department, to Prove a Proposed Assessment Is Wrong with Evidence and Legal Arguments.*

By statute and regulation, a taxpayer has the burden of proof in a protest. IC § 6-8.1-5-1(a) (2004) states: "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Id.* The implementing regulation, 45 IAC § 15-5-3(b)(8) (2004), is to the same effect. As regards the burden of proof in claiming an exemption from tax in particular, Indiana law is well settled on two points. First, tax exemptions are disfavored and any statute conferring one must be strictly interpreted. *E.g., J.D. Adams Mfg. Co. v. Storen*, 58 S. Ct. 913, 918 (U.S. 1938); *see also id.* n.18 (citing early Indiana Supreme Court opinions). The second, following from the first, is that the burden of proof is therefore on the taxpayer to show that the otherwise taxable matter in question is entitled to exemption under the statute the taxpayer claims is applicable. *State Bd. of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M. (New Castle Moose Lodge)*, 765 N.E.2d 1257, 1259 (Ind. 2002) (citing *Ind. Dep't of State Rev. v. Safayan*, 654 N.E.2d 270 (Ind. 1995)); *see also Safayan*, 654 N.E.2d at 272 ("[T]axpayers claiming exemptions have the burden to show they meet the terms of the exemption statutes.") (alteration added).

BLACK'S LAW DICTIONARY (8th ed. 2004) defines the term "burden of proof" as a "party's duty to prove a disputed assertion or charge." *Id.* at 209 (definition 1). The burden of proof is two-fold, consisting of both the burden of persuasion and the burden of production. *See Porter Mem'l Hosp. v. Malak*, 484 N.E.2d 54, 58 (Ind. Ct. App. 1985) (noting that "burden of proof" is not a precise term, as it can mean both the burdens of persuasion and production).

The terms "burden of production" and "burden of persuasion" have two distinct meanings. *See State v. Huffman*, 643 N.E.2d 899, 900 (Ind. 1994) (stating that there are "two senses" of the term "burden of proof," the burdens of persuasion and production). The burden of production, also referred to as the burden of going forward, is the taxpayer's "duty to introduce enough evidence on an issue to have the issue decided by the fact-finder [in this case the Department]." *Id*. (Alteration added.) In other words, a taxpayer must submit evidence sufficient to establish a

prima facie case, i.e., evidence sufficient to establish a given fact and which if not contradicted will remain sufficient to establish that fact. *See Longmire v. Ind. Dep't of State Rev.*, 638 N.E.2d 894, 898 (Ind. Tax Ct. 1994); *Canal Sq. Ltd. P'ship v. State Bd. of Tax Comm'rs*, 694 N.E.2d 801, 804 (Ind. Tax Ct. 1998). *Cf. Bullock v. Foley Bros. Dry Goods Corp.*, 802 S.W.2d 835, 839 (Tex. App. 1990) (observing, in challenge to state's sales and use tax audit, that comptroller's deficiency determination is prima facie correct and that taxpayer must disprove it with documentation).

In contrast to the burden of production component of the burden of proof, the burden of persuasion is the taxpayer's "duty to convince the fact-finder to view the facts in a way that favors that party." BLACK'S LAW DICTIONARY 209 (8th ed. 2004). The same definition indicates that the term "burden of persuasion is also "loosely termed *burden of proof*." *Id.* (Emphasis in original.) *See also Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 114 S. Ct. 2251, 2257, (U.S. 1994) ("[T]he drafters of the [federal Administrative Procedure Act] used the term 'burden of proof' to mean the burden of persuasion."). Some Indiana cases have referenced this dual meaning. *See, e.g., Peabody Coal Co. v. Ralston*, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991) (observing that in criminal cases, the "State carries the ultimate burden of proof, or burden of persuasion").

Indiana law is also settled that this state's taxation hearing officers, and by extension the state-level taxing authorities of which they are agents, "do not have the duty to make a taxpayer's case [of entitlement to an exemption]." *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1024 (Ind. Tax Ct. 1999) (alteration added), *cited with approval in New Castle Moose Lodge*, 765 N.E.2d at 1264. The Tax Court stated the rationale for this rule in *Hoogenboom-Nofziger* as follows:

> [T]o allow [a taxpayer] to prevail after it made such a cursory showing at the administrative level would result in a tremendous workload increase for [the Department and] the State Board [now the Indiana Board of Tax Review], … administrative agenc[ies] that already bear[ ] … difficult burden[s] in administering this State's [listed and] property tax system[s]. If taxpayers could make a de minimis showing and then force [the Department or] the State Board to support its decisions with detailed factual findings, the [Indiana taxing authorities] would be overwhelmed with cases such as this one. This would be patently unfair to other taxpayers who do make detailed presentations to the [taxing authorities] because resolution of their appeals would necessarily be delayed.

715 N.E.2d at 1024-25 (alterations added).

*b. The Taxpayer Has Not Submitted Any Evidence or Legal Arguments to Support His Protest and Meet His Burden of Proof that the Proposed Assessment Is Wrong.*

As previously noted, the present taxpayer did not submit any books, records or other evidence, or any legal argument, to support his deemed protest. In addition,

he neither attended the protest hearing nor asked for a continuance or telephone conference. The taxpayer thus has met neither his burden of production nor his burden of persuasion, and thus also has not met his burden of proof. However, 45 IAC § 15-5-3(b)(6) states: "If a taxpayer or its representative fails to appear at a hearing without securing a continuance, the department [of state revenue] will decide the issues on the best information available to the department." *Id.* (Alteration added.) The best information available is that in the investigation file, including the investigation Summary. The Department will accordingly decide the merits of this protest based on the information in that file and Summary, and on the applicable law. Because the field investigator cited only one legal authority, a regulation, to support the investigation adjustment, the Department will next discuss the applicable law in more detail for the taxpayer's benefit.

2. Applicable Substantive Law

*a. Imposition of Use Tax*

IC § 6-2.5-3-2(a) (1998) imposes the use tax "on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." Title 45 IAC § 2.2-3-20, which the field investigator cited in the Summary, is to the same effect, stating in relevant part that:

> All purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax. … If the seller is not required to collect the tax … , the purchaser must remit the use tax directly to the Indiana Department of Revenue.

*Id.* (Alterations added.) IC § 6-2.5-3-1(a) defines "use" as "the exercise of any right or power of ownership over tangible personal property." *Id.*

*b. Presumption of Taxability and Burden of Proving Non-Taxability*

IC § 6-2.5-3-7(a) further states that:

> (a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.

*Id.* The corresponding regulation, 45 IAC § 2.2-3-24, is to the same effect, stating that "[a]ll sales of tangible personal property by a retail merchant for delivery in Indiana shall be presumed to be retail transactions for storage, use, or consumption in Indiana." *Id.* (Alteration added.) "The burden of proving the contrary is upon the purchaser[, i.e. the consumer taxpayer]." 45 IAC § 2.2-3-25 (alteration added).

*c. Exemptions from Use Tax in General*

Regarding exemptions from use tax in general, IC § 6-2.5-3-4(a)(2) and (b) respectively read as follows:

> (a) The storage, use, and consumption of tangible personal property in Indiana is exempt from the use tax if:
>
> …
>
> (2) The property was acquired in a transaction that is wholly or partially exempt from the state gross retail tax under any part of IC [chapter] 6-2.5-5, except IC 6-2.5-5-24(b) [not in issue here], *and the property is being used, stored, or consumed for the purpose for which it was exempted.*
>
> *(b) If a person issues a state gross retail or use tax exemption certificate for the acquisition of tangible personal property and subsequently uses, stores, or consumes that property for a nonexempt purpose, then the person shall pay the use tax.*

*Id.* (Emphases and alterations added.) The parallel regulation, 45 IAC § 2.2-3-15, is more specific, stating that:

> If any person who issues an exemption certificate in respect to the state gross retail tax or use tax and thereafter makes any use of the tangible personal property covered by such certificate, or in any way consumes, stores, or sells such tangible personal property, where such use, consumption, storage or sale is *in a manner which is not permitted by such exemption*, such use, consumption, or storage shall become subject to the use tax (or such sale shall become subject to the gross retail tax), and such person shall become liable for the tax or gross retail tax due thereon.

*Id.* (Emphasis added.)

*d. The "Agricultural Machinery, Tools or Equipment" Exemption*

IC §§ 6-2.5-5-1 and -2 exempt two classes of tangible personal property used in agriculture from sales and use tax. IC § 6-2.5-5-1 is inapplicable to this protest. IC § 6-2.5-5-2(a) comes closer to applying to the present issue. It states that "[t]ransactions involving agricultural machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for his direct use in the direct production, extraction, harvesting, or processing of agricultural commodities." *Id.* The implementing regulation defines the phrase

"agricultural machinery, tools and equipment" as "refer[ring] to machinery, tools, and equipment used on a farm to cultivate, grow, produce, reproduce, harvest, extract or process animals, poultry, and crops used to produce food or agricultural commodities for human or animal consumption (or for further use in producing food or agricultural commodities)." 45 IAC § 2.2-5-6(f) (alteration added).

Well-settled Indiana judicial precedent defines "agriculture" as "the art or science of cultivating the soil, including the planting of seed, the harvesting of crops, and the raising, feeding and management of live stock or poultry." *Fleckles v. Hille,* 149 N.E. 915, 915-16 (Ind. App. 1925), adopted in *H.J. Heinz Co. v. Chavez*, 140 N.E.2d 500, 502 n.1 (Ind. 1957). However, the United States Supreme Court has limited the scope of agriculture for legal purposes by holding that not every kind of work, task or duty related to agriculture is agricultural. In *Farmers Reservoir & Irrigation Co. v. McComb*, 69 S. Ct. 1274 (U.S. 1949), the Court succinctly observed that "the conclusion that [a type of] work *is necessary* to agricultural production does not require [saying] that it *is* agricultural production." *Id.* at 1277 (emphases in original) (alterations added).

It follows that the mere fact that tangible personal property is used on a farm or as an incident, even a necessary one, to agricultural operations does not automatically make such use agricultural. Nor does any such use, without more, make the purchase or leasing of that item exempt from sales or use tax. IC § 6-2.5-5-2(a) and the corresponding regulation, 45 IAC § 2.2-5-6, both make this point clear. The statute requires "the person acquiring th[e] property [claimed to be agricultural machinery, tools or equipment to have] acquire[d] it for his direct use in the *direct* production, extraction, harvesting, or processing of agricultural commodities." *Id.* (Emphasis and alterations added.). Subsection (c) of the regulation states in pertinent part:

> (c) Purchasers of agricultural machinery, tools, and equipment to be directly used by the purchaser in the direct production, extraction, harvesting, or processing of agricultural commodities are exempt from [sales and use] tax provided such machinery, tools, and equipment have a direct effect upon the agricultural commodities produced, harvested, etc. Property is directly used in the direct production, extraction, harvesting, or processing of agricultural commodities if the property in question has an *immediate effect* on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process [which produces agricultural commodities], … .

45 IAC § 2.2-5-6(c) (emphasis and alterations added). (*See also* 45 IAC § 2.2-5-6(d)(5), last sentence, from which the last alteration to the above quotation comes.) The last sentence of subsection (c) does go on to state that "[t]he fact that such machinery, tools, or equipment may not touch the commodity or livestock or, by itself, cause a change in the product, is not determinative." *Id.* (Alteration added). However, subsection (e) of the same regulation goes on to list several categories of purchases that the Department considers to be not related to direct agricultural production and therefore taxable. One of these categories is "[m]achinery, tools, and equipment used in general farm maintenance[.]" 45 IAC § 2.2-5-6(e)(3). Another is

> "[s]ales of machinery, tools, and equipment to be used in managerial, … or other nonoperational activities not directly used in production, harvesting, extraction, and processing of agricultural commodities … . This category includes, but is not limited to, machinery, tools, and equipment used in … farm management and administration[.]"

*Id.*(e)(4) (alterations added).

3. The Taxpayer's Admitted Uses of the ATV Are Taxable, Not Exempt, Uses of Agricultural Machinery or Equipment.

The taxpayer has submitted no evidence in this protest to the Appeals Section in support of his claim that his driving the ATV during irrigation and farm inspections was an exempt agricultural use, as required under the authorities discussed in Subsection I.B.1a. The only indications of his use of the ATV in the file are his statements to that effect to the investigator as memorialized in the Summary, and in the taxpayer's initial letter. The Appeals Section can only consider the former as being evidence.

The taxpayer's admitted use of the ATV for inspection drives makes the ATV "machinery, tools, and equipment used in … farm management and administration" under 45 IAC § 2.2-5-6(e)(4). The ATV might also possibly qualify as "[m]achinery, tools, and equipment used in general farm maintenance" under 45 IAC § 2.2-5-6(e)(3) (alteration added), assuming the taxpayer ever discovered on one of his inspection drives that his irrigation equipment, or any other farm equipment or building, needed maintenance. As noted above, these two paragraphs of the regulation, read together with IC § 6-2.5-3-7(a) and 45 IAC § 2.2-3-24, make a transaction involving tangible personal property used for either of these purposes presumptively taxable. If the property was originally acquired using an agricultural exemption certificate, as was the case here, either or both of such uses would have voided any alleged exemption claimed using that certificate and rendered the transaction presumptively taxable by operation of IC §§ 6-2.5-3-4(b) and -7(a) and 45 IAC 2.2-3-15 and -24.

Under IC § 6-8.1-5-1(a) and 45 IAC §§ 2.2-3-25 and 15-5-3(b)(8) the burden of proof was on the taxpayer to rebut this presumption of taxability. He has not submitted any evidence or legal argument that would enable him to do so. The taxpayer has thus failed to meet his burden of proof, and his purchase of the ATV was taxable by operation of IC § 6-2.5-3-2(a) and 45 IAC § 2.2-3-20.

## FINDING

The taxpayer's protest is denied as to this issue.

## II. Use Tax – Exemptions - Medical Equipment, Supplies and Devices

## Tax Procedure – Protests - Failure to Participate - Burden of Proof

## DISCUSSION

A. TAXPAYER'S ARGUMENT

The taxpayer stated in his initial protest letter that he has had bilateral hip replacement and spinal surgeries and that using the ATV for transportation to inspect his farm is easier on him physically than walking around that farm to do so.

B. ANALYSIS

It is not clear to the Department whether this statement is merely an observation, or some kind of half-articulated alternative argument that he is also entitled to claim the ATV exempt under IC § 6-2.5-5-18 and 45 IAC § 2.2-5-28 as being medical equipment or a medical device. Assuming, without finding, that the taxpayer's statement could be interpreted in the second way, the Department notes that any such argument would fail for two reasons. The first is that, as was the case with the taxpayer's agricultural exemption, he has submitted no supporting evidence. Second, any such argument would be wrong as a matter of law. The Indiana Tax Court rejected a comparable argument in a case in which the handicapped taxpayer was denied a refund of sales tax he paid on two vans he had bought and adapted for handicapped use. *Stump v. Ind. Dep't of State Rev.*, 777 N.E.2d 799, 802 (Ind. Tax Ct. 2002).

## FINDING

The taxpayer's protest is denied.

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